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Supreme Court of the United States

OCTOBER TERM, 1944

No. 913

ADIRONDACK TRANSIT LINES, INC.
Appellant,

vs.

THE UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, ET AL.

MEMORANDUM IN OPPOSITION TO MOTIONS TO AFFIRM JUDGMENT OF DISTRICT COURT AND IN OPPOSITION TO STATEMENTS AGAINST JURISDICTION

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INDEX

PAGE

Memorandum In Opposition to Motions to Affirm and In Opposition to Statements against Jurisdiction... 1

Appellant in opposition to the Motion to Affirm filed by the United States of America and Interstate Commerce Commission respectfully states, the following in respect to first issue..... 2

In reply in respect to Defendants-Appellees, United States of America and Interstate Commerce Commission second issue..... 11

In reply with respect to Defendants-Appellees, United States of America and Interstate Commerce Commission third issue..... 17

Conclusion with respect to the Motion to Affirm by Appellees, United States of America and Interstate Commerce Commission 21

Reply with respect to Motions to Affirm and Statements against Jurisdiction filed by Defendants-Intervenors-Appellees, Hudson & Manhattan Railroad Company and Manhattan Coach Line, Inc., et al.... 22

Conclusion with respect to the Motions to Affirm and Statements against Jurisdiction filed by Defendants-Intervenors-Appellees, Hudson & Manhattan Railroad Company and Manhattan Coach Line, Inc., et al. 24

Conclusion 25

Certificate of Service..... 26

Table of Cases Cited

PAGE

Alton Railroad Company v. United States, 315 U. S. 15 23

Cincinnati, Newport and Covington Rwy. Co., Common Carrier Application, 30 MCC 423 15

Crescent Express Lines v. The United States, 320 U. S. 401 23

Lincoln Tunnel Applications, 12 MCC 184.....14, 15, 16, 23

Nevin Midland Lines, Common Carrier Application (MC18975), 4 MCC 547 .....13, 14

Noble v. United States, 319 U. S. 88 23

Pennsylvania Greyhound Lines, Inc., Lincoln Tunnel Route, 30 MCC 333 23

Union Stockyard v. U. S., 308 U. S. 213 21

United States v. Maher, 307 U. S. 148 23

U. S. v. Carolina Freight Carriers Corporation, 315 U. S. 475 23

White Horse Pike Bus Company, Incorporated, Common Carrier Application (No. MC1973), 2 Motor Carrier Cases 80 .....12, 14

Other Authorities Cited

Interstate Commerce Act (Part II),
Section 206(a) 3, 5, 11

Motor Carrier Act,
Section 212(a) 8, 9

United States Code,
Section 312 .....9, 10
Section 306 23
Section 307 .....23, 24

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MEMORANDUM IN OPPOSITION TO MOTIONS TO AFFIRM JUDGMENT OF DISTRICT COURT AND IN OPPOSITION TO STATEMENTS AGAINST JURISDICTION

The Plaintiff-Appellant files this brief pursuant to Rule XII, paragraph "3" and Rule VII, paragraph "3" of the General Rules of this Court.

The United States of America and the Interstate Commerce Commission, Defendants-Appellees, filed a joint motion to affirm the decree of the District Court.

The Defendant-Intervenor-Appellee, Hudson & Manhattan Railroad Company has filed a motion to affirm the order and judgment of the District Court and a Statement against Jurisdiction.

The Defendants-Intervenors-Appellees, Manhattan Coach Lines, Inc., Manhattan Transit Company, West-

wood Transportation Co., Inc., Westwood Transportation Lines, Inc., Intercity Transportation Co., Inc., Jersey City & Lyndhurst Bus Co., Inc. and Mountain Transit Corporation, have filed a motion to affirm the decree and judgment of the District Court and a Statement against Jurisdiction.

Appellant in Opposition to the Motion to Affirm Filed by the United States of America and the Interstate Commerce Commission States the Following in Respect to the First Issue:

The facts of the instant case are not disputed. Only issues of law are involved.

It is the contention of the Appellant, a common carrier of passengers by motor vehicle, that its use of the Lincoln Tunnel, a vehicular tube between and connecting New York City, N. Y., with Weehawken, N. J., as a route between the aforesaid municipalities, is not in violation of the certificate of convenience and necessity issued to it by the Interstate Commerce Commission.

The Appellant contends as a matter of law, which contentions are the sole issues herein, that such right or authority to use the tunnel crossing accrued to it by virtue of the express provisions of its certificate of convenience and necessity. It also claims such right by virtue of its filing an application for a change of route with the Interstate Commerce Commission, which application specifically designated the Lincoln Tunnel and adjoining streets as the route of travel between Weehawken, N. J., and New York City, N. Y., and the resulting acts of omission and commission of the Interstate Commerce Commission on said application.

The Appellant's said certificate designates the Appellant's route between Saranac Lake, N. Y., and New York City, N. Y., via routes specified therein from Saranac Lake,

N. Y., to the intervening point of New Jersey Highway S5. Said certificate continues as follows:

> "* * * Thence over New Jersey Highway S 5, New Jersey Highway 1, and unnumbered roads *to Weehawken, N. J., and thence across the Hudson River to New York and return over the same route.*"

Appellant's certificate was issued pursuant to Section 206(a) of the Interstate Commerce Act (Part II), colloquially known as the "grandfather clause." Said "grandfather clause" empowered the Interstate Commerce Commission to grant certificates of convenience and necessity to interstate motor carriers who were engaged in service on June 1, 1935, and had continuously thereafter remained so engaged, subject to certain exceptions or provisions not pertinent herein.

Appellant's application for said certificate was made January 31, 1936, and said certificate was issued by said Commission, June 4, 1937, effective July 5, 1937. Prior to the issuance thereof and on January 18, 1937, at an informal hearing before an Interstate Commerce Commission representative authorized to conduct the same, an amendment to the Appellant's "grandfather" application was accepted by and filed with the Interstate Commerce Commission. The record discloses such filing and the Interstate Commerce Commission admits it. Almost five months later said Commission issued said certificate of convenience and necessity, the portion of which heretofore set forth, is now in question.

The description of that portion of said certificate, "Weehawken, N. J., and thence across the Hudson River to New York, * * *" is admittedly broad in scope. Broad not in respect to designation of the termini points, but broad only as to the designation of the manner of traversing the Hudson River between Weehawken, N. J., and New York City, N. Y. The Appellees contend and the District

Court held that this portion of said certificate is ambiguous, and that it therefore follows that if said certificate is ambiguous, then the said Commission has the right and the power to interpret and construe its own order and certificate unless such interpretation or construction is erroneous or arbitrary. The Appellant agrees that the Commission does have the power to interpret and construe its own orders and certificates where the same are ambiguous, and that its interpretation and construction is entitled to great weight.

However, it logically follows that if said certificate is not ambiguous, no interpretation or construction by the Commission is necessary or proper. Appellant contends said certificate is not ambiguous, and the same is not subject to interpretation.

The only color of ambiguity that can be attached to Appellant's certificate is that it is broad in scope, and a finding of ambiguity predicated on the ground that no particular manner or route of traversing the Hudson River between Weehawken, N. J., and New York City, N. Y., has been designated, is unwarranted and illogical.

It is this interpretation of the Court that the Appellant contends is arbitrary and erroneous. In issuing the certificate to the Appellants, the route of the Appellants as indicated in their original application over several hundred miles of highway in the States of New York and New Jersey was meticulously followed. The Commission being cognizant of the proposed modification in the Appellant's routing between Weehawken, N. J., and New York City, N. Y., issued a certificate which, in this area only, did not meticulously follow the route specified in the Appellant's original "grandfather" application. In this immediate area only did its certificate broaden the authority granted to the Appellant. The purpose and intent of such grant would appear to be obvious and not ambiguous.

However, although the Appellant denies that its certificate is ambiguous and thereby subject to the Commission's interpretation, Appellant will assume for purpose of argument that the certificate is ambiguous. Would then the construction heretofore applied by the District Court and the Commission be correct. Appellant submits that such construction is arbitrary and erroneous. Overt acts and actual conduct of the Commission are such as to compel the Commission to interpret said certificate as authorizing the use of the tunnel.

The record shows that when the original application for a certificate of convenience and necessity was made by the Appellant, pursuant to Section 206(a) of the Interstate Commerce Act (Part II), the Appellant's route across the Hudson River between Weehawken, N. J., and New York City, N. Y., on June 1, 1935 was the West Shore Railroad Ferry, and such route was so specified in the application. Almost five months before the issuance of the certificate, the Appellant filed with the Commission at the aforementioned informal hearing, an amended "grandfather" application requesting the use of the tunnel crossing between New York City, N. Y., and Weehawken, N. J., on the opening thereof. Prior to the issuance of the certificate, the Commission had before it the Appellant's original "grandfather" application for a certificate and the said amended application. The certificate so issued did not specify the route as set forth in the original application, but was couched in the broad language. "Weehawken, N. J. thence across the Hudson River to New York * * *." That such broad description of route was given cannot be attributed to mistake. The report of Division 5 of the Interstate Commerce Commission said in respect to the issuance of the certificate "Here, there is no question of fraud, misrepresentation, or a certificate issued in error." At no time has it been contended or held by the Court, the Commission or the Appellees that there was fraud, mis-

representation or mistake in the issuance of Appellant's certificate.

The intent of the Commission is further evidenced by the fact that one day subsequent to the opening of the tunnel to public and commercial vehicular use, Appellant filed with the Interstate Commerce Commission on forms prescribed by the Commission for such purpose an application for change of route. The printed matter on said forms advised that if application was not granted, applicant would be sent proper forms in order to apply for a certificate or a permit to extend operations. It is undisputed that the Commission never forwarded any forms to Appellant. The form on which application was made was prepared by the Commission and furnished to applicants by virtue of the Commission's order dated May 17, 1937. Appended to said form and printed thereon is an explanation. This explanation contains the following words:

> "If the application is not granted the applicant will be sent proper forms in order to apply for a certificate or permit to extend operations."

This explanation was, as appears from the record, a part of the order of the Commission itself approved on the aforementioned date.

What intent is disclosed by such action or non-action on the Commission's part? If the original intent had not been to authorize the use of the tunnel crossing by the Appellant's certificate, the Commission would be obligated to notify the Appellant to apply for a certificate or permit to extend operations, particularly when by the wording of their forms, they charged themselves with the duty of giving notice in event said application for change of route was denied. On December 22, 1937, the day the Lincoln Tunnel was opened for use, Appellant herein discontinued its operations between New York City, N. Y., and Weehawken, N. J., via the ferry and routed its operations be-

tween the aforesaid municipalities via the tunnel route, and has operated daily and continuously through the tunnel since the opening thereof.

The original complaint proceeding out of which the issues herein arose, was not brought on the motion of the Commission, but was instituted by some of the intervenors herein by complaint dated January 15, 1940. While such inaction on the part of the Commission might ordinarily not reflect any tangible evidence of intention, viewed in the light of the open and constant use of the tunnel by the Appellant accompanied by the foregoing application for change of route and "grandfather" amendment filed with the Commission, creating the additional notice of record, the ostensible acquiescence of the Commission to such operation, must constitute to a great degree a recognition of lawful operation.

Further and strong evidence of intention is disclosed by the following excerpt from the report of Division 5 wherein the following statement appears:

> "On January 18, defendant (Appellant herein) filed an amendment to its 'grandfather' application and sought authority to operate through the tunnel on its completion. On December 23, 1937, after its certificate was effective, defendant filed a change-of-route application in which it sought the right to cross the Hudson River through the tunnel instead of by using the ferry. Since the certificate theretofore granted did not specify the means of crossing the Hudson River, *the use of the tunnel was not considered a violation of the terms of the certificate and no action was taken on the application.*" (Parentheses and italics supplied.)

The Appellant contends the interpretation and construction of the Appellant's certificate by the full Commission in its opinion of June 6, 1944, which construction and interpretation was affirmed by the District Court, is so violently

opposed to each and every overt act of the Commission, as heretofore mentioned, that such construction and interpretation is erroneous and arbitrary. The Appellant is not alone in contending that the interpretation which it has put on the certificate issued to it and the subsequent action of the Commission with respect to the amendment of route authorized its service via the tunnel is the proper one. It should be significant at this point to call the Court's attention to the fact that the Examiner before whom the matter was tried considered the operation justified under the facts and that he was supported in this conclusion by Division 5 of the Commission to which Division the matter was submitted on exceptions to the report and that on the full Commission's decision, four Commissioners dissented from the Commission's order overruling Division 5.

The Appellees contend that this is not a proceeding to suspend, change or revoke a certificate as contemplated by Section 212(a) of the Motor Carrier Act. But of what moment is this argument when the effect of the order is tantamount to a partial revocation, modification and suspension of the authority granted to the Appellant by the Commission's certificate. The order of the Commission construing the section of the certificate under consideration here has stated that they will construe it to mean "from Fairview over Fairview Avenue to North Bergen; thence over Park Avenue; thence over Boulevard East to its intersection with Pershing Road (in Weehawken); thence over Pershing Road to the 42nd Street Ferry of the West Shore Railroad (in Weehawken); thence by ferry to New York." This is certainly not the route specified in the certificate; it is not the route specified in the application; it is not the route specified in the amendment to the application. It is in effect an attempt to restrict the Appellant's routing in an area where the Appellant enjoys a broader certificated authority. It is not contended that the certificate issued by the Commission to the Appellant was procured by fraud

or misrepresentation or issued by mistake. In the absence of these facts the certificate itself should constitute the Appellant's authority. That which the Appellant is authorized by the certificate to do it should be able to do. That which it may not do pursuant to the terms of the certificate it is precluded from doing. The only authority for suspension, termination, revocation or amendment of a certificate issued by the Interstate Commerce Commission is contained in Section 312 of the United States Code (Section 212 of the Motor Carrier Act):

> "In the case of Smith Brothers, John C. Sandidge, Receiver, Revocation of Certificate (MC 16670), Vol. 33 Motor Carrier Cases 465, at page 472, the Commission states as follows:
>
> "In our opinion, the language of the foregoing section (Section 212 of the Motor Carrier Act) is clear and definite and unmistakably shows that Congress intended that a certificate, once effective, may be terminated by us only on the conditions, and according to the procedure, therein specifically provided. We may issue decision upon decision, and order upon order, on an application for a certificate so long as sufficient reason therefor appears and until all controversy is determined, but once a certificate, duly and regularly issued, becomes effective, our authority to terminate it is expressly marked off and limited. All the antecedent decisions and orders are essentially procedural in character, and may be set aside, modified, or vacated, but the certificate marks the end of the proceeding, just as the entry of a final judgment or decree marks the end of a court proceeding." (Parentheses supplied.)

In issuing its cease and desist order here on appeal the Commission has disregarded the express authority granted by it to the Appellant. It has by such order attempted to amend its pre-existing certificate. In effect, the theory followed by the Commission has been to take the position that the authority granted should not have been granted

and to take the position that despite the wording of the authority contained in the certificate, the Commission would effectively amend the same by its cease and desist order and require the Appellant to return to the route followed by it in its service on June 1, 1935. The cease and desist order is an attempt to effect an amendment of the Appellant's certificate without fulfilling the requirements of Section 312 of the United States Code. With what security can the public deal thereafter with a certificate. The Appellant's certificate plainly does not specify the ferry and does not require the reversion by the Appellant to the ferry as a means of crossing the Hudson River between Weehawken and New York. Such a crossing is not specified in the certificate. A stranger to the former service of the Appellant upon reading the certificate could not realize that any such limitation of street routings in Weehawken as proposed by the Commission in its cease and desist order was applicable to the Appellant's certificate. If the decision of the Commission is sustained, then the wording of a certificate is of no moment since the determination of the rights therein contained cannot be gleaned from the wording thereof. Recourse must be had to history although the certificate puts nobody on notice that it is not self-contained and self-descriptive.

The Appellant's certificate is most certainly not restricted by its words to the highway and river crossing used by the Appellant on June 1, 1935. This, however, would be the effect of the enforcement of the cease and desist order.

The Court's decision in upholding the Commission's action which in this manner amends, suspends, terminates and revokes in part the authority contained in the Appellant's certificate is inequitable and erroneous.

In Reply With Respect to Defendants-Appellees, United States of America and Interstate Commerce Commission, Second Issue:

The Appellees urge that the Commission by virtue of Section 206(a) of the Interstate Commerce Act is empowered to issue a certificate under that clause to a carrier only if "any such carrier or predecessor in interest was in *bona fide* operation as a common carrier on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time"; and that since Appellant did not and could not operate via the Lincoln Tunnel during the grandfather period the Commission was not authorized under the "grandfather" clause to grant operating rights over such route.

However, the Commission does not subscribe to the theory that the "grandfather" clause froze all activities of interstate carriers to the exact route the carrier was operating on the crucial day, June 1, 1935. The Appellant strongly urges that the Commission has recognized the distinction between an actual change in route and a deviation or modification wholly within municipalities.

In making its change from the Ferry crossing to the Lincoln Tunnel crossing of the Hudson River, the plaintiff was required to extend its route approximately seven-tenths of a mile. This extension was wholly within the Town of Weehawken, N. J. into which town the plaintiff had received authority to operate.

The Commission's general rule with respect to deviations of routes by a carrier within a municipality is that it is not concerned with such deviations. Only in exceptional cases where the deviations of routes within a munic-

ipality goes to the essence of the operation itself are they concerned. In issuing the certificate to the Appellant they did so without foreknowledge that approximately two years thereafter they would make a determination that exceptional circumstances prevailed in the New Jersey area adjacent to the Lincoln Tunnel. The Appellant's certificate, therefore, should be considered as having been granted under the provisions of the Commission's general rule. It is the Appellant's contention that this is exactly what happened. No question of convenience and necessity in the use of the Lincoln Tunnel was involved at the time of the issuance of the certificate to the Appellant nor at the time of the commencement of service by the Appellant through the Lincoln Tunnel at the opening thereof. No specified authority was required by the Appellant to make this change from the ferry crossing to the tunnel crossing between Weehawken, New Jersey and New York City, New York. As long as the Appellant had the authority to cross the Hudson River from Weehawken, N. J. to New York City, N. Y., it could use any river crossing which travelled between said two points.

In *White Horse Pike Bus Company, Incorporated, Common Carrier Application* (No. MC 1973) 2 Motor Carrier Cases 79 at page 80, Division 5 in granting a certificate to an interstate bus line, stated as follows:

> "Various streets within Philadelphia, Camden, Absecon, Pleasantville, and Atlantic City are included in the description of regular routes in the application. We are not concerned here with the routes traversed within municipalities or with the routes over which applicant operates between adjoining municipalities. Camden adjoins Philadelphia, Absecon adjoins Pleasantville, and Pleasantville adjoins Atlantic City. The routes between Camden and Philadelphia, Absecon and Pleasantville and Pleasantville and Atlantic City need not be specified in any certificate granted herein."

In the foregoing case a certificate not limited as to street routings within large cities such as Philadelphia, Pa., Camden, N. J. and Atlantic City, N. J. was granted for a bus operation under a "grandfather" application. This case was submitted March 6, 1937 and decided May 26, 1937.

It is significant to note that even though the applicant here specified in the description in its application streets within Philadelphia, Pa., and Camden, N. J., two very large communities, one of which is the third largest city in the United States, the Commission as of the date of this petition between such points did not concern itself with the street routings.

In *Nevin Midland Lines, Common Carrier Application* (MC 18975), 4 MCC 547, Division 5 in issuing a certificate on the "grandfather" application for an omnibus carrier, stated:

> "We have considered the record and find that the examiner adequately stated that facts in the following report which accompanied his recommended order, although we take occasion to add that his statement of the doctrine that the Commission is not concerned with routes traversed within municipalities must be read in the light of the routes here considered and is therefore not to be accepted as a precedent for use in any case in which the routes within municipalities constitute the very essence of the operation or at least assume greater importance than here. We express no opinion as to what our decision might be in those circumstances."

The statement of the Examiner referred to as to the Commission's doctrine with respect to routes traversed within municipalities, 4 MCC 550, is as follows:

> "Various streets in the cities on the claimed routes are described in the application, as amended. The Commission is not concerned with routes traversed within municipalities, and such streets need not be specified in any certificate granted herein."

Some of the cities involved in the application passed upon were New York, N. Y., Washington, D. C., Jersey City, N. J., Newark, N. J., Elizabeth, N. J., Trenton, N. J., Philadelphia, Pa., Baltimore, Md., New Brunswick, N. J., and Pittsburgh, Pa.

The *Nevin Midland Lines* case was submitted December 24, 1937, decided February 28, 1938, and it is significant to note that the operations included service between New York City, N. Y., and Jersey City, N. J., through the Holland Tunnel. As of such date, therefore, the Commission did not consider the delineation of streets within a large New Jersey City connected by tunnel with New York City, as a necessary part of the certificate.

The certificate of the Appellant was issued June 5, 1937, effective July 5, 1937. We, therefore, see that in May, 1937, a few months prior to the issuance of the certificate to the Appellant the delineation of street routes between the large communities of Philadelphia, Pa., and Camden, N. J., was not considered of sufficient importance to be included (*White Horse Pike Bus Company, Incorporated*) and as of a date a year and a half after the certificate was issued to the Appellant, the Commission was still of the opinion that the delineation of streets in a certificate authorizing service between New York City, N. Y., and Jersey City, N. J., was not of its concern (*Nevin Midland Line*).

Even in the case of *Lincoln Tunnel Applications,* submitted December 8, 1938, decided March 10, 1939, 12 Motor Carriers Cases 184, at page 198, in referring to the service within the Borough of Manhattan, City of New York, in connection with applications for the use of the Lincoln Tunnel between New Jersey and New York, Division 5 stated:

> "It becomes relatively unimportant, therefore, as to which routes the operators traverse within the

terminal area in Manhattan, and in view of the fact that there is a measure of control by the city over the use of its streets, there appears to be no necessity for designating the routes within Manhattan."

The Commission in the *Lincoln Tunnel Applications,* however, found it necessary to make a complete designation of routes within the New Jersey territory involved therein. It is, therefore, only as a result of a determination made a year and a half subsequent to the effective date of the Appellant's certificate that the Commission made a determination that street routings in the New Jersey territory specified in the *Lincoln Tunnel Application* case was a matter with which they were concerned.

It does not appear plausible nor equitable, therefore, that the Appellant's certificate which had been in effect since July 5, 1937, should be subject to the subsequent exceptional determination requiring street routings in such New Jersey territory.

See also:

Cincinnati, Newport and Covington Rwy. Co., Common Carrier Application, 30 M. C. C. 423 at page 440 *et seq.*

Therefore, the change made by the Appellant from the ferry to the tunnel, was, in the light of the foregoing cases a deviation or modification of route, and not a change of route repugnant to the "grandfather" clause according to the rulings of the Commission which deviations were of no concern to the Commission. Any attempt to apply the findings of the *Lincoln Tunnel Applications,* is tantamount to affecting a retroactive determination inconsistent and contrary to the existing law at the time of the opening of the Lincoln Tunnel to vehicular traffic and the use thereof by the Appellant's omnibuses.

The Appellees advance a lesser argument that the "District Court observed that the Appellant's certificate did not authorize transportation under, but merely 'across' the river." Webster's Unabridged Dictionary defines "across" as follows: "From side to side; opposed to along; crosswise; transversely from one side to another." From the aforegoing definition it is obvious that "across" is extremely broad in meaning. It is difficult to contend that a sufficient limitation of meaning can be attached to this word so as to determine the manner by which the Appellant may traverse the Hudson River.

It is significant to note in this respect also that the Commission itself in referring to the Lincoln Tunnel refers to it as a river crossing. The Court states in its opinion that the certificate authorizes transportation "merely across the river" and indicates that this does not, in their opinion, authorize service across via the tunnel. Would their contention likewise be that the George Washington Bridge does not go across the river? The Commission itself in *Lincoln Tunnel Applications,* 12 M. C. C. 184 at page 187 states as follows:

> "In 1937 the Holland Tunnel and George Washington Bridge, port authority *crossings* handled approximately 13,000,000 and 8,000,000 vehicles respectively and the ferries carried over 13,000,000" (Italics ours.)

and again on the same page:

> "in 1937 there were nearly 1,000,000 bus *crossings* of the George Washington Bridge and Holland Tunnel and it was estimated that there would be 300,000 bus *crossings* of the Lincoln Tunnel in 1938." (Italics ours.)

It, therefore, appears that the Commission finds the bridge, the tunnel, and the ferries as all river *crossings.*

In Reply With Respect to Defendants-Appellees United States of America and Interstate Commerce Commission, Third Issue:

Appellees' third issue deals with the change-of-route application filed by the Appellant with the Interstate Commerce Commission on December 23, 1937, on forms prescribed by the Commission, which filing was made one day subsequent to the opening of the tunnel.

A true copy of said application is as follows:

B. M. C. 70 M. C.

INTERSTATE COMMERCE COMMISSION

BUREAU OF MOTOR CARRIERS

APPLICATION FOR CHANGE OF ROUTE

Name ADIRONDACK TRANSIT LINES, INC. dba

Address, 241 W. 42nd Street, New York City, N. Y.

OLD ROUTE: Between Weehawken, N. J. and New York City, N. Y. as follows: via 42nd Street Ferry.

NEW ROUTE: Between Weehawken, N. J. and New York City, N. Y. as follows: via Lincoln Tunnel.

NOTE. The only modification in route applied for herein concerns the manner of traversing the Hudson River between New York and New Jersey and a slight alteration of street routes within the limits of Weehawken, N. J. and New York City, N. Y. There is no substantial change in service between the terminal points or to and from intermediate and off route points, and no question of public convenience and necessity as set out in Section 207 of the Motor Carrier Act or consistency with the public interest and

policy as set out in Section 209B of said Act. No additional towns, cities or villages are served under the amended and none are deprived of service by reason of said amendment. The motor carrier's application for certification stated its intention to use the Lincoln Tunnel upon its completion.

No map, specifically outlining both routes, is submitted with this application by reason of the foregoing.

A copy of this application was served, in person or by registered mail, upon all known direct competitors by motor vehicle, rail, or water as follows:

None.

A copy of this application was filed with the following State Boards having jurisdiction over motor-carrier operations along the old and new route:

Public Service Commission, State Office Building, Albany, Board of Public Utility Commissioners, Trenton, N. J.

(Verified December 21st, 1937)

(Signed) Martin J. Kelly, Jr.,
Secretary.

ORDER

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 17th day of May, A.D. 1937.

In the Matter of Applications for Change of Authorized Route

The matter of applications under the above title being under consideration:

It is ordered, That applications for change of route authorized under the Motor Carrier Act, 1935, shall be in the

form and contain the information called for in the form of application attached hereto and made part hereof.

IT IS FURTHER ORDERED, That the verified original application and one copy thereof shall be filed with this Commission, and that one copy shall be delivered in person or sent by registered mail to the Board, Commission, or official of each State in which applicant operates (or to the Governor where there is no Board, Commission, or official) having authority to grant or approve certificates or permits authorizing motor carrier operations in intrastate commerce, and that one copy shall be served, in person or by registered mail, upon each motor carrier and each carrier by rail or water, known to the applicant, with whose service the operations described in such application are or will be directly competitive.

By the Commission, Division 5.

W. P. BARTEL,
Secretary.

(Seal)

EXPLANATION

A motor carrier engaged in transportation requiring a certificate or permit from this Commission may secure permission to make a change of route without complying with section 207 or section 209(b), and without the formality of a hearing, if the change of route satisfies the following two requirements:

(1) The change in use of highways must not amount to any substantial change in service between the terminal points, or to and from intermediate and off-route points.

(2) The change in route must not involve any question of public convenience and necessity as set out in

> section 207, or consistency with the public interest and policy as set out in section 209(b).

If the application is not granted, the applicant will be sent proper forms in order to apply for a certificate or permit to extend operations.

Appellant stated in said application that no question of public convenience and necessity or consistency with the public interest and policy was involved. This statement was true since the Appellant was making a deviation in the route traversed by it within the scope of authority contained in its certificate. It was filed pursuant to the provisions of the order of the Commission dated May 17, 1937, heretofore set forth in its entirety.

The attention of the Court is directed to the last paragraph of the "Explanation" wherein the following is stated:

> "If the application is not granted, the applicant will be sent proper forms in order to apply for a certificate or permit to extend operations."

As recited in the Appellees' brief the Commission never took any action with respect to this application. No forms were ever sent to the Appellant. Did the admitted non-action on the part of the Commission convey any rights to the Appellant? It would logically follow that if the Appellant already had the right to use the tunnel, such application, if effective, could not grant a right already vested in the Appellant. If, however, the Appellant had not acquired a right to use the tunnel by December 23, 1937, it is the Appellant's claim that the right to use the tunnel was given to the Appellant by virtue of the filing of said application with the Commission. The Appellant has made a diligent search for legal precedent pertinent to this issue, but believes that none exist. The Appellant

respectfully urges that *Union Stockyard* v. *U. S.*, 308 U. S. 213, cited by Appellees is not applicable here.

The Commission saw fit to make a declaration whereby it succinctly informed the public that in the event that the application was not granted, applicant would be sent proper forms.

By such explanation the Commission made known the manner by which it would administer the disposition of applications for change-of-route. It is submitted that the Commission saw fit to adopt a particular method for the granting or denying of this application, and that by reason thereof, its silence or inaction was its manner of granting said application. This is the only equitable construction that can be given.

Conclusion With Respect to the Motion to Affirm by Appellees United States of America and Interstate Commerce Commission:

Appellant in conclusion respectfully submits that it has the right or authority to use the Lincoln Tunnel as a means of travel between Weehawken, New Jersey, and New York City, New York; that such authority was granted by the certificate of convenience and necessity issued to it by the Interstate Commerce Commission. That the interpretation and construction given to its certificate by the Commission and the District Court were arbitrary and erroneous. That in the alternative, if the authority for such means of travel is not granted by its certificate, then it can be found that the Appellant's change to the tunnel crossing was a deviation not tantamount to a change of route in violation of its certificate but was a deviation which the Commission was not concerned with, or in the further alternative, that if it be found that the Appellant had no authority or right to use the tunnel crossing, then

such right was granted by the Commission to the Appellant by reason of the filing of the application for a change of route.

No statement against jurisdiction was made by the Defendants-Appellees, United States of America or Interstate Commerce Commission.

Reply With Respect to Motions to Affirm and Statements Against Jurisdiction Filed by Defendants-Intervenors-Appellees—Hudson & Manhattan Railroad and Manhattan Coach Line, Inc., Et Al.:

With the exception of the statements against jurisdiction, made by the Intervenors-Appellees—the issues and contentions respectively raised and advanced are substantially the same as those covered in the brief of the United States of America and the Interstate Commerce Commission and a further discussion of the same would be merely repetition and would serve no purpose.

However, the brief of the intervenors attacks the jurisdiction of the Court. The Appellant will stand on the substantiality of the questions involved herein as now set forth in its jurisdictional statement. However, for a further but brief comment on the question herein, it is respectfully submitted that in the Appellant's opinion, although numerous citations and decisions of this Court are set forth, not one is controlling. That the questions involved are novel and highly debatable is best illustrated by a concise history of the matter. The Examiner before whom the original proceeding was instituted, found the Appellant's use of the tunnel was lawful; Division 5 affirmed; and the full Commission, on reconsideration, reversed the finding as to the tunnel operation with four Commissioners dissenting. The statutory Court although a *per curiam* decision, did not cite one case in support of its decision.

The purported authorities cited by the Appellees in their motion to affirm are inapplicable or in instances where they have any application to the issues involved herein are more helpful to the Appellant than to the Appellees. The case of *Noble* v. *United States*, 319 U. S. 88; *Crescent Express Lines* v. *The United States*, 320 U. S. 401; *United States* v. *Maher*, 307 U. S. 148 are decisions of this Court upholding the action of the Interstate Commerce Commission in imposing terms and conditions on the granting of a certificate or denying application for a certificate. The Appellant does not contend that the Commission lacks the power to restrict or deny an application but this is not a proceeding to acquire a certificate. This is a proceeding to utilize a certificate in accordance with its terms. The cases of *Alton Railroad Company* v. *United States*, 315 U. S. 15 and *United States* v. *Carolina Freight Carriers Corporation*, 315 U. S. 475 are more helpful to the Appellant than to the Appellees. For each of these cases in fact hold, at least in part, that the Commission may authorize a greater authority under a "grandfather" application than the activity on the effective "grandfather" date would have justified. The *Lincoln Tunnel Application* case itself, 12 M. C. C. 184, was an instance in which certain operators sought certificates. The Commission could and did require before the granting of such certificates the establishment of the requisite proof warranting the issue thereof. *Pennsylvania Greyhound Lines, Inc., Lincoln Tunnel Route*, 30 M. C. C. 333, was wholly inapplicable as the change of route in this case required the carrier to traverse communities not theretofore served.

The Appellant's certificate was granted to it pursuant to Section 306 of the United States Code. There is no provision in this section which requires a certificate to specify by specific routing the authority granted to a passenger carrier by motor vehicle. It is true that Section 307 which is not pertinent to this "grandfather" application

has such a requirement. The Appellant's certificate was not issued pursuant to Section 307. Authority is therefore existent for a certificate on a "grandfather" application for passenger carriers in which the specific routing might not be specified provided the territory is set forth. No new or different communities are involved in the Appellant's operation through the tunnel than were involved in their operation via the ferry. Insofar as a "grandfather" certificated operator may be required to submit to the Commission proof of public convenience and necessity before the Commission may be authorized to grant authority for service other than that in which the applicant was specifically engaged on the effective date of the "grandfather" clause, the Commission in this case was not lacking in such proof.

At the informal conference called by the Interstate Commerce Commission in support of the Appellant's application for a "grandfather" certificate the Appellant's president stated that the use of the Lincoln Tunnel would afford a quicker, safer route for crossing the Hudson River. This could constitute sufficient evidence of public convenience and necessity to justify any extension of authority by the Commission to the Appellant.

Conclusion With Respect to the Motions to Affirm and Statements Against Jurisdiction Filed by Defendants-Intervenors-Appellees—Hudson & Manhattan Railroad and Manhattan Coach Line, Inc., Et Al.:

Appellant adopts the conclusion heretofore stated in respect to the Defendants-Appellees, United States of America and Interstate Commerce Commission and urges that this Court find that the questions involved herein are substantial.

CONCLUSION

Wherefore, Appellant Respectfully Prays That the Motions Filed by Appellees Herein Be Denied and That the Statements Against Jurisdiction Be Dismissed.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have this day served a copy of the foregoing document upon the following attorneys of record in this proceeding by mailing by first class mail a copy thereof properly addressed to each of said following attorneys:

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Dated at New York, N. Y., this 20th day of February, 1945.

MARTIN J. KELLY, JR.,
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